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No. 287

No. 516, Misc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,
vs.
THE STATE OF CALIFORNIA, *et al.*,
Respondents.

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,
vs.
HONORABLE MARTIN PENCE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, Motion for Leave to File Petition for a Writ of Prohibition or Mandamus and Petition for a Writ of Prohibition or Mandamus.

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No. ..... Misc.
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AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

HONORABLE MARTIN PENCE.

Motion for Leave to File Petition for a Writ of Prohibition or Mandamus.

Pursuant to Rule 31 of the Rules of the Supreme Court of the United States, petitioner hereby moves for leave to file a Petition for a Writ of Prohibition or Mandamus directed to the Honorable Martin Pence, Chief Judge of the United States District Court for the District of Hawaii. The Petition for a Writ of Prohibition or Mandamus which petitioner proposes to file if leave is granted is set forth in the alternative in the Petition for a Writ of Certiorari or for a Writ of Prohibition or Mandamus which is attached hereto.

Respectfully submitted,

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vs.

HONORABLE MARTIN PENCE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, for a Writ of Prohibition or Mandamus.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported. It is reprinted herein as Appendix A.

Jurisdiction.

The decision below was entered on April 15, 1968. No rehearing was requested. This Court has jurisdiction to grant a writ of certiorari under 28 U.S.C. §§1254 and 2101, and under Rule 21 of the Rules of this Court.

The Court also has jurisdiction to grant a writ of prohibition or mandamus under 28 U.S.C. §1651. *Cf. De Beers Consolidated Mines Ltd. v. United States,* 325 U.S. 212 (1945); *Beacon Theatres v. Westover,* 359 U.S. 500 (1959).

Question Presented.

Whether an order of a Federal District Judge purposefully designed to require a defendant to go to trial concurrently, in three seperate Federal District Courts, in related complex antitrust cases transgresses the permissible limits of judicial discretion in the administration of justice or constitutes a denial of due process of law.

Statement of the Case.

This alternative petition involves principally an order requiring petitioner to try concurrently three complex antitrust cases involving similar issues. The order was upheld by a decision of the United States Court of Appeals for the Ninth Circuit which petitioner asks this Court to review on writ of certiorari. As an alternative, petitioner asks the Court to review this case by issuing a writ of prohibition or mandamus.

These cases were originated by respondents' filing actions for damages and injunctive relief alleging violations of §1 of the Sherman Act. 15 U.S.C. §1. More than 350 plaintiffs are presently active in the litigation,

while petitioner is the only remaining corporate defendant. An officer of petitioner is involved in some of the cases and is the only other remaining defendant. Five former defendants entered into settlements shortly after the challenged order was first entered. The cases were filed in United States District Courts for the Northern District of California, the Central District of California, the Southern District of California, the Western District of Washington and the District of Oregon. With damages trebled, the claims against petitioner in these cases total an amount which, according to respondents' calculations, would bankrupt petitioner. These are, therefore, in effect, "capital" cases.

In order to coordinate and thereby expedite pre-trial processing of the cases, the Chief Judge of the Ninth Circuit caused the cases to be assigned to the Honorable Martin Pence, Chief Judge of the District of Hawaii, who was designated to sit in the various Districts in which the litigation was and is pending. In early 1965, Judge Pence assumed the responsibility for "all Western Concrete and Steel Pipe cases."

Although Judge Pence technically did not consolidate the cases, they have proceeded as if they were consolidated for purposes of discovery. The parties were ordered to utilize joint interrogatories and depositions were ordered taken on a joint basis. Many other joint activities were ordered. The parties cooperated and complied with these orders and the pre-trial preparation of the cases has been basically completed. It was in this context that the subject of trial settings arose.

In late 1966, while discovery was still in progress, Judge Pence and the parties first considered the question of trial scheduling. Counsel for respondents, who

have repeatedly rejected the idea of consolidating the cases into one for trial, as petitioner has suggested,[1] recommended instead the selection of four "bellwether cases" to be tried in sequence. In October 1966, Judge Pence established a tentative trial plan which contemplated four trials, with reasonable respites of from 60 to 90 days between each one. This type of trial plan, which envisaged partial consolidation, was and is acceptable to petitioner, although petitioner believes that one consolidated trial would best serve the interests of justice and judicial economy.

Shortly thereafter, however, Judge Pence formulated a quite different trial schedule which is the subject of this petition. Essentially, it would require petitioner to try three cases simultaneously in three different District Courts. Such a plan was first hinted at in a letter dated November 28, 1966, from Judge Pence to counsel for the litigants:

> "Mr. Cooper [Judge Pence's administrative assistant] has written you concerning the proposed agenda for the December 14 conference. The possible revision that I am considering is that of scheduling all discovery in *all* cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle—with Judge Boldt sitting —San Francisco—with Judge Zirpoli sitting, and in Los Angeles—with myself sitting—sometime around October 1967. If this procedure is followed, it is anticipated that *all* cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (R. p. 244.)

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[1]Record, pages 273-77; 288-89; 297. (Hereinafter references to pages of the Record will be cited as "R. p. .....")

This notion of simultaneous or "practically simultaneous" trials was discussed at a December 14, 1966 and a February 3, 1967 conference involving Judge Pence and counsel for the parties. Respondents urged adoption of the plan. Petitioner objected. At the first of these two conferences, Judge Pence stated to Mr. Jansen, counsel for petitioner, who had said that he planned personally to try all of the cases:

> "The Court: Well, I can say personally that if we decide that all these cases will be tried simultaneously or practically simultaneously, that you are going to have to split yourself into three personalities and be in three different locations at one time.
>
> Mr. Jansen: Well, I think that is impossible.
>
> The Court: Well, if it is impossible, you—if we decide that it is going to be tried that way, you are going to have to decide which one you are going to try." (R. p. 248.)

Subsequently, on February 21, 1967, Pre-Trial Order No. 9 was entered, formally embodying the concept of simultaneous trials. This concept has remained in Pre-Trial Orders Nos. 10-17, the latest of which was entered May 28, 1968. Thus, Paragraph S of Pre-Trial Order No. 14, which was initially the subject of petitioner's appeal in the Court of Appeals for the Ninth Circuit, read in part:

> "S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated will preside. At such time the trial

judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district; and (d) determine whether other cases pending in any such district should be consolidated for trial. *At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968.*" (Emphasis added.)

As stated above, an appeal from this Order was taken by petitioner and a partial stay, applicable to the trial settings but not to further pre-trial proceedings, was granted by the Court of Appeals. While that appeal was pending, Pre-Trial Order No. 15 was entered which, while somewhat different in its pertinent language and in respect of the actual trial dates set, would also have effected the result of requiring simultaneous or "practically simultaneous" trials:

"26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.) Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated, present. At such time, after hearing, and consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any

such district should be consolidated for trial; (e) formulate a final pre-trial order for each trial case, setting such cases for trial *at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each. . . .*"[2]

The change in emphasis which allowed for a two-week time lag at the start, with overlapping thereafter, was made in response to the wishes of respondents' counsel, as expressed in the following colloquy which occurred at a pre-trial hearing held September 7, 1967:

> "Mr. Ferguson [lead counsel for respondents]: . . . The plaintiffs have suggested that as a first of the simultaneous or nearly simultaneous trials there be selected the City of San Diego, and Calleguas Municipal Water District case, the State of California Department of Highways, and the Department of Water Resources case be consolidated for trial in the city of San Diego; and this being set for trial for January 22nd, 1968 before the Honorable Martin Pence.
>
> * * * *

---

[2]Emphasis added. This portion of the order is quoted at footnote 3 of the Ninth Circuit opinion which is reprinted *infra* as Appendix A. It has been estimated that each of the three cases will require a minimum of six to eight weeks of trial time. Paragraph 27 of Pre-Trial Order No. 17, currently in effect, is virtually identical to Paragraph 26 of Pre-Trial Order No. 15, except that it speaks of selecting "the case(s) for trial" and sets the first trial to commence no later than September 3, 1968. Pre-Trial Order No. 17 is reprinted *infra* as Appendix B.

We suggest, secondly, and with the approval of the United States Government, that their total claims involving some $8,000,000 be set for San Francisco or the second simultaneous trial. And we have suggested a date there of February 5, 1968 which I have been advised the government will be able to meet.

The Court: And why do you block that one let's say two full weeks after the January 22nd? Why do you set that out in your theory?

* * * *

Mr. Ferguson: Well, my feeling is at first that it is not as efficient to start all three of these cases actually simultaneously.

The Court: Why?

Mr. Ferguson: Well, I think for several reasons. One of the best reasons is this: As you know, all of the plaintiffs here, including the United States Government, participated in an economic survey by Dr. Lanzillotti—

The Court: Is it anticipated Dr. Lanzillotti will be on the stand for two weeks?

Mr. Ferguson: No it is not. It is not anticipated that he will be on the stand for any two weeks. But it is anticipated that he will be required at all trials, and if you did start all trials simultaneously, the probabilities are there would be a serious conflict and a delay in connection with damage testimony. It also would not give Dr. Lanzillotti a fair opportunity to have a little time between the various cases to prepare his evidence for these particular cases." (R. pp. 281-83.)

Provision for some type of a time-lag between the starting dates of each of the trials has appeared in all of the orders subsequently entered. Thus, at least the convenience of respondent's witness is to be served by the device of "practically simultaneous" (or overlapping) trials rather than fully simultaneous trials as was earlier contemplated by Judge Pence. As elaborated later in this petition, however, this time-lag does not alleviate the problem posed for petitioner by the trial schedule, and it may in fact make that problem more severe.

The Court of Appeals reviewed the merits of the cases as on petition for a writ of mandamus, rather than as on appeal. Accordingly, Judge Pence was allowed to appear as "real party in interest." He filed a brief and participated, through his administrative assistant, in oral argument. On April 15, 1968, the Court of Appeals ruled on the merits, denying the writ of mandamus and then dismissing the appeal as moot.

Argument.

I. Important Questions Are Presented Concerning the Proper Administration of Justice in Federal Courts.

A. Multi-Party, Protracted Antitrust Cases Are Increasing in Number and Involve New Techniques Not Heretofore Reviewed by the Court.

In recent years, there has been an explosion of so-called "big-case" private antitrust litigation in the Federal District Courts. This type of litigation typically has involved large numbers of plaintiffs, and even many defendants. It has been further characterized by its extension into many Districts. Generally speaking, the critical facts as to liability, and the essential issues of law, have been identical within each set of such cases, with the primary distinction from plaintiff to plaintiff being merely the nature and extent of damages if liability can be proved. The Electrical Equipment Company Antitrust cases constitute perhaps the most widely publicized of these cases. At their peak, some 1900 plaintiffs were involved in that litigation.

Because of the obviously heavy burden these multi-party protracted cases have presented to the administration of justice in Federal District Courts, the development of novel procedures for processing the cases has been the subject of several studies. One such study was instituted by a group of judges commissioned for the task by the Chief Justice of the United States and the Federal Judicial Conference. Out of the efforts of that group, and a previous inquiry conducted under the

auspices of the American Bar Association, came the *Handbook of Recommended Procedure in Trial of Protracted Cases,* 25 F.R.D. 351 (1960). The principal recommendations of these studies pertain to coordinated discovery, pre-trial proceedings and consolidation for trial. While radically innovative in some respects and somewhat conservative in others, the suggested procedures do not in any serious way prejudice the essential rights of litigants. Rather, their focus is directed towards streamlining the pretrial proceedings so that those rights—both of plaintiffs *and* defendants—will be protected by assuring rational development of the pertinent facts and early trials at which the various theories of liability and defenses can be tested.[3]

With one possible exception discussed below, this Court has not so far reviewed any case challenging the propriety of the recently developed techniques for processing "big cases". It is essential, however, that the Court exercise its supervisory authority over the federal judicial system and delineate the bounds within which traditional concepts of justice and fairness in trial procedure can be discarded and coercive methods adopted in the interest of expediency. This case, presenting as it does a coercive device that has until now been unrecommended and untried, would provide an excellent vehicle for the Court to use in assessing the need, utility

[3]Subsequent to the decision of the Court of Appeals, a statute was enacted which provides for transfer of multi-district litigation for the purposes of coordinating or consolidating pre-trial proceedings. 28 U.S.C. § 1407. The statute does not, however, cope with the problems of trial scheduling or set any guidelines of relevance to the questions herein posed.

and fairness of a number of procedural devices that are gaining increasing acceptance in the lower federal courts. It is a particularly appropriate time for the Court to grant such a review, since a new array of treble-damage cases is presently at the pleading stage in various District Courts throughout the country following in the wake of the convictions obtained by the Government in the recently-tried price-fixing cases involving the drug industry.

The one instance known to counsel in which this Court has reviewed a questionable technique employed by a District Judge in processing major antitrust litigation is *LaBuy v. Howes Leather Company,* 352 U.S. 249 (1957). There the District Judge had ordered the litigation referred to a Master for trial, citing the likely length of the trials, the complexity of the issues, and the congestion of his court calendar as reasons. A writ of mandamus against this procedure was granted by the Court of Appeals for the Seventh Circuit, and this Court affirmed. While the substance of the unfairness in the District Judge's order there was much like the unfairness here, as elaborated *infra,* the particular question reviewed by this Court was narrow in scope and limited in its context.

Until this Court provides better guidelines within which litigation of this nature may be processed and tried, each and every "big case" involving new procedures will carry the potentiality of reversal for lack of fairness in the methods employed by District Judges to prepare and try the cases. And, since such cases frequently involve lengthy trials, reversal will necessarily result in a huge amount of waste in terms of both economics and judicial manpower.

B. The Trial Schedule Ordered in This Case Would Make It Inherently Impossible for the Petitioner and the Individual Defendant to Be Accorded a Fair Trial.

Of the many unusual techniques that have been employed by Judge Pence in this case, none is so objectionable as the order that would force this petitioner to defend three virtually identical cases in three different courts at the same time. Explicitly stated in the early pre-trial order, and carried through the later orders in thinly disguised language, this trial schedule can only be designed to make it impossible for petitioner adequately to defend any of the cases, thereby putting petitioner's "feet to, not one, but three fires" and forcing it to settle for whatever it can rather than have its day in court. The impossibility of adequately defending in these circumstances, and thus the inherent unfairness of the order, manifests itself in several respects.

Perhaps the most obvious way in which this order seriously prejudices the defense lies in the fact that petitioner will be required to scatter its defense counsel. This will necessarily result in use of attorneys at several of the trials who will not have taken part in the discovery proceedings or in the strategy sessions at the pleading and discovery stages. Obviously, such counsel —whatever their credentials and abilities—will not be able to examine and cross-examine witnesses nearly so effectively as could attorneys who have been intimately involved in preparation of the defense for many months. (This form of prejudice is not in any sense the fault of petitioner, since at the discovery stage there was no suggestion that there would be simultaneous trials, and, if there had been, that prospect would not have suggested to petitioner that it should secure

additional counsel since at that time petitioner was one of six defendants and its counsel were participating in the defense with some seven major law firms representing other defendants.) Likewise, coordination of counsel's efforts will be extremely difficult, even given modern communication methods, since the day-to-day trial of a major lawsuit necessarily involves long evenings of reviewing transcripts, preparing witnesses and formulating trial strategy, leaving little if any time for discussions with others who are trying separate, albeit related, cases.

Petitioner will further be severely handicapped by the fact that some witnesses and documents will be needed in two or more districts at one and the same time. While one set of attorneys prepares to meet the next day's trial problems by consultation with witnesses, company executives and employees, and by referring to company records, the attorneys defending in the other two districts will often find themselves confronted with the need to meet with the same persons and review the same records. And even if these problems were not insurmountable, counsel at two of the trials will necessarily be denied the presence of certain key persons who could, as the trials progress, supply information and suggestions crucial to the effective cross-examination of respondents' witnesses.

But an even more crippling effect of the simultaneous trials is to be found in the impact on petitioner's use of witnesses. Obviously, the witnesses can attend only

one trial at a time. Thus, petitioner will be required to risk the wrath of the trial judges and, more importantly, the juries, by requesting frequent continuances. This problem has one other compelling aspect, because an individual (an officer of petitioner) is a defendant in several of the cases. Certainly he should be entitled to attend all of the trials in which he has a personal stake, but he will be precluded from doing so because the trials will overlap.

The unfairness to petitioner of simultaneous trials is highlighted by the fact that respondents' counsel objected to three trials beginning on the same day because of the impact on *their* use of witnesses (*supra*, pp. 7-9), and suggested a two-week time lag at the start of each case to allow respondents to use their principal expert witnesses in the most effective manner possible. The orders framed subsequently have allowed for such a time lag, thus apparently solving respondents' problem. But the time lag does not meet the needs of petitioner, and indeed may even aggravate its difficulties since the respondents, as plaintiffs in all of the cases, will have control of the timing of at least the first half of each trial. By accelerating the pace in one trial while lagging in another, they can make it impossible for petitioner to have the right people in the right places at the right times. This impossibility will be present both insofar as cross-examination of respondents' witnesses is concerned and with respect to

presentation of the defense. Even an unlimited number of continuances would not solve this problem for petitioner.

C. No Rational Reason Has Been Advanced in Support of Simultaneous Trials.

Whether simultaneous, or practically simultaneous trials in litigation of this nature can ever be justified where it would work an unfairness to either side is questionable. *Cf. LaBuy v. Howes Leather Company, supra.* Certainly the answer must be negative unless some counterbalancing, compelling reason dictates such an approach. No such reason has ever been advanced here.

The trial plan proposed by Judge Pence would not effect a saving in judicial manpower. There will be three separate trials, each requiring a presiding District Judge and a jury as well. Consolidation of all the cases would, of course, effect such a saving, and petitioner has repeatedly advocated consolidation or at least that one strong "bellwether" case be tried ahead of the others to test the various theories of liability and defenses. (R. pp. 297; 301-304.) But respondents have in each instance opposed that step, and Judge Pence has acceded to their wishes.

No fact has been brought forward indicating that any respondent would suffer hardship by a reasonable spacing of the trials. Respondents are not "little" companies who have suffered severe economic losses as a result of alleged antitrust violations and who need an immediate award of damages or a substantial settlement in order to remain solvent. They consist, in the main, of municipalities and other governmental units

who are quite able to survive through whatever period would be required to complete a reasonable trial schedule. The time required for each trial—estimated at six to eight weeks—is not such as to require simultaneous trials in order to avoid unconscionable delay. Indeed, the discovery in these cases has been accelerated so that they are ready for trial well in advance of the norm for complex litigation. While the rush to prepare may well have prejudiced petitioner in some respects, the prejudice has not been nearly so great as that which would result from simultaneous trials.

The only possible reason, then, that can underlie the unusual trial plan formulated by Judge Pence is that it will force petitioner to settle these cases rather than risk losing everything in a situation where rational trial strategy is impossible. The inference that this purpose motivated Judge Pence can be drawn from the record. For example, the following comments were made at a pre-trial hearing on September 7, 1967, before Judge Pence:

> "Mr. Jansen [Counsel for Petitioner]: But I am a little disturbed and a little surprised at Counsel's reasons for wanting to have these cases tried the way he suggests.
>
> Because larded throughout these reasons he repeats the phrase 'in the absence of a reasonable and rational offer of settlement. . . .'
>
> And he talked, too, about taking over our business.
>
> He says right here about putting American out of business, and all that, and he keeps repeating the fact that the real reason he wants these cases

tried this way is to try to force us to settle the cases.

Now, your Honor—

The Court: Well, I won't let all of that blame fall upon Mr. Ferguson.

You remember away back when I told you then —and it has been understood since that time, and I will say it later on today, we are going to have practically simultaneous trials." (R. pp. 298-299.)

To bludgeon a defendant into giving up its right to test its facts and theories before a court and a jury must be considered arbitrary and capricious action, if not a denial of fundamental constitutional rights. In the words used by the Court in *LaBuy v. Howes Leather Company, supra,* at 256, the order amounts

> "to little less than an abdication of the judicial function depriving the parties [here petitioner and the individual defendant] of a trial before the court on the basic issues involved in the litigation."

The arbitrariness of the planned trial schedule becomes even more apparent when the context in which it was adopted is compared with the situation that would be presented had these cases not been initially brought under the unified control of Judge Pence, but instead had proceeded through pre-trial activities under the guidance of separate District Judges. If, in the supposed situation, all of the cases became ready for trial at the very same time, surely petitioner would be

granted some kind of relief. Perhaps two of the actions would be stayed pending the outcome of the third. *Cf. United States v. B. F. Goodrich,* 41 F. Supp. 574 (S.D.N.Y. 1941); *Beacon Theatres v. Westover,* 359 U.S. 500, 508 (1959).[4] Absent such rulings, petitioner might be granted a change of venue in two of the actions, bringing them into a single District so that all could be consolidated for trial. 5 *Moore's Federal Practice* ¶42.02 n. 11. Or, petitioner might be granted relief in the nature of a bill of peace. *Cf. Sovereign Camp, Woodmen of the World v. O'Neill,* 266 U.S. 292 (1924);[5] see also *Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa,* 42 F. Supp. 917 (D. Ida. 1942). If such types of relief from simultaneous trials would be available in the hypothesized situation where the problem occurs by accident, it is inconceivable that a District Judge could be allowed to create the same prejudicial context by his own deliberately conceived orders. This Court must afford a remedy from such a gross abuse of judicial discretion.

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[4]In the course of the *Beacon Theatres* opinion Mr. Justice Black stated:

> "On proper showing, harassment by threats of other suits, or other suits actually being brought involving the issues being tried in this case, could be temporarily enjoined pending the outcome of this litigation." 359 U.S. at 508.

[5]Petitioner does not contend that the actions here were fraudulent and part of a conspiracy as was alleged in *O'Neill.* But the respondents themselves here have speculated in their briefs that these actions in the aggregate might well result in petitioner's economic ruin; the substance of this latter factor was also present in *O'Neill.*

II. These Questions Are Properly Before the Court at This Time.

The Court of Appeals for the Ninth Circuit has rendered a decision to the effect that the District Judge's plan to require petitioner to try three cases at once should not be disturbed at this time. That decision is reviewable on certiorari despite the fact that it is not, in a classic sense, a final decision disposing of the merits of the litigation. See *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). The only complication to review by certiorari inheres in the fact that the District Judge, subsequent to the Ninth Circuit decision, entered Pre-Trial Orders Nos. 16 and 17[6] superseding Pre-Trial Order No. 15 which was the particular Order reviewed by the Ninth Circuit. The later orders, however, did not alter the substance of the matter of which petitioner complains, nor did they give any indication that Judge Pence would retreat one inch from his determination to force petitioner to undergo concurrent trials.

The opinion below was posited in large measure on the belief that an experienced trial judge "upon further consideration" might decide "to restrict" the overlapping trials or to eliminate the overlap entirely and, sensibly, "provide an interval between trials." But, the entry of the subsequent orders (Nos. 16 and 17), which are substantively unchanged, demonstrates that Judge Pence has a closed mind on the subject. The other avenue of relief envisaged by the opinion below (*i.e.*, that Judge

[6]Pre-trial Order 17 is reprinted herein as Appendix B.

Pence and the other two trial judges might reject the concept of concurrent trials when sitting individually rather than as a committee) is illusory. Reason dictates that the two consulting trial judges are in full sympathy with the concept of simultaneous trials. If they were not, it is more than likely that Judge Pence would have selected substitutes. Thus, it taxes credulity to believe that when each of these three judges assumes control of his own docket he will reverse his field and afford petitioner relief. The identity in practical effect of the present order and the order reviewed by the Ninth Circuit, as well as the scope of the opinion below, should, therefore, lead to the conclusion that review by certiorari would be appropriate. If, however, the Court believes that effective relief could not be granted on certiorari because of the intervening new orders, it may assume jurisdiction by reviewing all of the orders on writ of prohibition or mandamus directed to Judge Pence. *Cf. De Beers Consolidated Mines, Ltd. v. United States, supra.*

Whichever jurisdictional approach is taken, it is critical that the Court grant review now rather than waiting until the litigation is finally determined on the merits of the underlying claims. The issues now in controversy will not be merged into a final judgment on the merits and will not easily lend themselves to review at a later date. Petitioner might well win some of the cases and lose others, or win all, or lose all, and it will be difficult, if not impossible, to determine the impact of the prejudice from case to case. More importantly, assuming petitioner loses all of the separately tried cases, each will be considered individually on appeal. The record in each case will reflect only the comments and rulings of the trial judge who presided in that par-

ticular case, and the variety of factors prejudicially affecting the defense and cutting across all of the cases will necessarily often not be apparent from the record. Consequently, the appellate court will not be able to consider the overall flavor of prejudice which the challenged order creates. Piecemeal review after trial will therefore come too late, and this is the only occasion on which the Court will be able to consider fully the important questions presented in their proper context. Moreover, the order for simultaneous trials is "fundamental to the further conduct of the case" and threatens irreparable harm to petitioner. It should, therefore, be reviewed now. *Gillespie v. United States Steel Corp., supra, at 154; De Beers Mines, Ltd. v. United States, supra.*

Two additional considerations argue persuasively in favor of assumption of jurisdiction by the Court now. Should the order for simultaneous trials go unreviewed by the Court at this time, petitioner may indeed be forced to settle for whatever it can, giving up its fundamental right to a full and fair trial and rendering future review of the order impossible. On the other hand, should petitioner not cave in so easily but instead try each of the cases for the six to eight weeks of trial time per case that is now forecast, a subsequent reversal would involve tremendous waste in terms of economics and manpower, both for the courts involved and for the parties.

Conclusion.

For the reasons stated above, petitioner urges the Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, or, in the alternative, to grant review by Writ of Prohibition or Mandamus.

Dated: July 11, 1968.

Respectfully submitted,

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United States Court of Appeals for the Ninth Circuit.

American Pipe and Construction Co., *Petitioner,* vs. Honorable Martin Pence, Chief United States District Judge, District of Hawaii, *Respondent,* and The State of California, et al., *Real Parties in Interest.* Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577, 22578 A-C.

[April 15, 1968]

On Appeal from the United States District Courts for the: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge;

American Pipe and Construction Co. (American), petitioner in this proceeding in the nature of mandamus, is the sole remaining defendant in twenty-seven antitrust treble damage actions pending in five United States District Courts in California, Oregon and Washington. The actions were filed in late 1964 and early 1965 and, with subsequent interventions, now involve approximately three hundred plaintiffs who are the real parties in interest in this mandamus proceeding. Five additional defendants were named in the complaints, but all of them settled out of court. The complaints allege a single conspiracy to allocate and divide orders and territories and engage in collusive and rigged bidding for the sale of concrete and steel pipe, in violation of section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

Shortly after the commencement of these actions the Chief Judge of the United States Court of Appeals for the Ninth Judicial Circuit designated and assigned The Honorable Martin Pence, United States District Judge for the District of Hawaii, to hold a district court in each of the five districts, namely: Northern District of California, Central District of California, Southern District of California, District of Oregon and Western District of Washington. We are informed that the Chief Judge of each of these districts, or the district judge of such districts then having one or more of these cases under assignment, thereafter assigned, or transferred the assignment of, all twenty-seven cases to Judge Pence "for all further proceedings."

Beginning in March, 1965, Judge Pence supervised extensive pretrial proceedings and entered a number of pretrial orders, including Pretrial Order No. 15 which is involved in this proceeding. Identical pretrial orders have applied to all actions, and the parties have generally performed the ordered acts on a common, joint or cooperative basis. However, no order has been entered in the district courts consolidating the actions for any purpose.

On October 11, 1967, Judge Pence entered Pretrial Order No. 12 which American construed as providing, among other things, for three or more simultaneous trials before three district judges. On October 30, 1967, American filed in this court a motion for leave to file a petition for a writ in the nature of mandamus to review this provision of the October 12, 1967 order. The motion was denied by this court on December 1, 1967, and a motion for reconsideration was denied on January 9, 1968.

In the meantime, on November 27, 1967, Judge Pence entered Pretrial Order No. 14, paragraph S of which American construed as providing, among other things, for three or more simultaneous trials before three district judges. On December 26, 1967, American appealed from the Pretrial Order No. 14 which was filed in each of the twenty-seven cases. In proceedings had before Judge Pence on January 12, 1968, the district court decided that the appeals were a nullity and that, consequently, the district court retained jurisdiction to enter further orders.

On January 26, 1968, American filed a motion in this court for a stay of further district court proceedings pending disposition of the appeals. At the same time American moved for consolidation of the appeals. The appeals were consolidated, a temporary stay was entered by this court on January 29, 1968, and a hearing was set for February 5, 1968. Defendants, real parties in interest in this mandamus proceeding, then moved to dismiss the appeals.

On February 5, 1968, following a hearing on American's motions for a stay and defendants' motion to dismiss the appeals, this court entered an order: (1) vacating the order for a temporary stay, (2) providing that the proceeding shall be considered in the nature of mandamus, (3) staying the trials in the twenty-seven cases pending disposition of the mandamus proceeding, but providing that all other proceedings in the district courts may continue, (4) specifying an accelerated schedule for briefing in the mandamus proceeding, the final brief to be filed on March 4, 1968, and (5) passing to the merits, defendants' motion to dismiss the appeals.

On February 15, 1968, American filed its opening brief in this court, in which American challenged paragraph S of Pretrial Order No. 14,[1] on the following grounds: (1) it unreasonably requires substantially simultaneous trials of three or more cases in three of

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[1]Paragraph S of Pretrial Order No. 14, reads as follows:

"S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo [sic] Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:

"(1) The voir dire examination;

"(2) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

"(3) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

"(4) Jury instructions and special interrogatories;

"(5) Counsel's opening statements;

"(6) The days and hours of the week during which Court will be conducted;

"(7) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

"(8) Daily trial transcripts;

"(9) A current index of the trial record;

"(10) The handling of documentary evidence at trial;

"(11) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;

"(12) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

"(13) The parties' report on their attempts to stipulate as to facts;

"(14) Further pre-trial proceedings;

"(15) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

"(16) Possibility of settlement."

the five districts,[2] and (2) it directs the unauthorized impanelling, by Judge Pence, of a special multi-judge court with purported authority to make rulings by joint action of the three judges, which will affect the outcome of many trials.

Thereafter, on February 23, 1968, Judge Pence entered Pretrial Order No. 15, paragraph 26 of which covers the same subject-matter of, and supersedes paragraph S of Pretrial Order No. 14.[3] In their answering brief thereafter filed, the plaintiffs in the antitrust suits accordingly undertook to defend, not paragraph S of Pretrial Order No. 14, but paragraph 26 of Pretrial Order No. 15. Since then all of the parties have agreed that the proceeding before us should be re-

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[2]In the Western District of Washington, some of the cases are pending in the Northern Division and some in the Southern Division.

[3]Paragraph 26 of Pretrial Order No. 15, omitting subparagraphs (A) through (P), which are identical with subparagraphs (1) through (16) of paragraph S of Pretrial Order No. 14, reads as follows:

> "26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonzo [sic] Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered. . . ."

garded as bringing into question paragraph 26 of Pretrial Order No. 15 rather than paragraph S of superseded Pretrial Order No. 14.

On March 1, 1968, Judge Pence moved in this court for leave to file a brief, as amicus curiae, which brief was tendered with the motion. On March 12, 1968, this court entered an order redesignating the parties as they would be designated in a mandamus proceeding. Judge Pence was designated respondent, appellant American was redesignated petitioner, and appellee defendants were redesignated real parties in interest. The brief tendered by Judge Pence was, under this order, received as respondent's return in the mandamus proceeding and American was given until March 20, 1968 to file an answer to such return. The mandamus proceeding was argued before this court on April 10, 1968.

As stated above, one of American's objections to paragraph S of Pretrial Order No. 14 was that, as construed by American, it purported to set up a special three-judge court convened by Judge Pence, which special court would hold a pretrial conference on a specified date with all three judges presiding, and at which pretrial conference the three judges would act together in making rulings and entering orders which would be binding in all twenty-seven cases.

The paragraph in question of Pretrial Order No. 14 is clearly subject to such a construction. However we need not pass upon the legality of such a course of action, inasmuch as it was abandoned in superseding paragraph 26 of Pretrial Order No. 15. In the latter paragraph (see note 3), it is made clear that Judge Pence would preside at the pretrial conference, then scheduled for June 5, 1968, and would make all rulings

therein and orders resulting therefrom. The two other district judges, instead of being designated as presiding judges were to be "present" so that Judge Pence could consult with them.

We do not understand that American objects to the latter arrangement and, in any event, it is legally unobjectionable. Circumstances can be stated by reason of which an order must be set aside because there were too many judges on the bench. See *In re Webster*, 9 Cir., 363 F.2d 937. But this is not such a case.

In the pretrial conference scheduled for June 5, 1968, Judge Pence will not be called upon to make any determination of fact or law bearing upon the merits of the antitrust suits. The indications are that the other two district judges are to be assigned to try two or more of these cases. It was therefore appropriate that they be present at the scheduled pretrial conference to familiarize themselves with the procedural aspects of the case and to confer with Judge Pence in the formulation of trial and pretrial procedures which Judge Pence would prescribe for all the cases.

In the previous hearing before this court there was some argument to the effect that Judge Pence might not follow a legally permissible course in arranging for the transfer of some of the cases to other district judges. However, there is no reason at this time to assume that any transfer of assignments by Judge Pence to another district judge will not accord with the rules and orders of the respective district courts. See 28 U.S.C. § 137.

This brings us to American's principal objection to paragraph S of Pretrial Order No. 14, now superseded

by paragraph 26 of Pretrial Order No. 15. This objection is that the paragraph in question requires simultaneous or substantially overlapping trials of three or more of these actions in three districts. American argues that this will confront American with difficulties and burdens of such magnitude as to assure, in advance, that American will not have fair trials.

Paragraph 26 of Pretrial Order No. 26 expressly contemplates the trial of three or more of the twenty-seven cases in three overlapping trials in three districts. The extent of the overlapping is left for final determination at the June 5, 1968 pretrial conference. Paragraph 26 further provides that the first trial will commence no later than June 24, 1968, and that the succeeding trials will commence thereafter "at intervals of not less than two weeks."

Some of the parties have estimated that each trial, whether of a single case or of consolidated cases, will require not less than sixty days. This means that if the first three trials do not exceed sixty days each, and if the maximum amount of overlapping contemplated by paragraph 26 is ultimately sanctioned, the first and second trials will be in progress simultaneously for two weeks, then all three trials will be in progress simultaneously for four weeks, after which the second and third trials will be in progress simultaneously for two weeks. To the extent that the trials exceed sixty days in length the overlapping of trials would be augmented.

On the other hand, as paragraph 26 now reads, the amount of overlapping, as finally prescribed as a result of the June 5, 1968 pretrial conference, may turn out to be much less. Under paragraph 26 the succeed-

ing trials are to commence at intervals of "not less than" two weeks. But, upon further consideration, Judge Pence, in consultation with the other district judges, might well determine to restrict such overlapping to a very few days, or to eliminate it entirely and perhaps even provide an interval between trials. Moreover, if the further order to be entered on June 5, 1968 provides for substantially overlapping trials, such a provision will not be binding upon Judge Pence or any other district judge to whom Judge Pence may transfer some of the cases, since every federal trial judge always retains control of his calendar. Thus an initial requirement for overlapping trials will be subject to reconsideration by the individual judges up to the dates of trial.

Nor is there any basis for this court to determine now, or at any time prior to completion of the trials, that any overlapping of trials which may be ordered will be unreasonable to the extent of constituting an abuse of discretion; or that any such overlapping will in fact result in substantial prejudice to the point of rendering the trials unfair; or that a trial judge, confronted during trial with circumstances indicating a reasonable probability of prejudice by reason of overlapping trials will not adequately meet the problem through the granting of continuances, or otherwise.

In addition, should an unreasonable and potentially prejudicial amount of overlapping take place, American may nevertheless prevail at the trials, in which event it will not be aggrieved by any actual overlapping. And should American not prevail, it may appeal to this court, at which time the question of unreasonable and prejudicial overlapping will be subject to review on the basis of actual trial events. On the other hand, were

we to undertake such inquiry at this time it would have to be on the basis of the present widely varying predictions as to what may happen at the trials, and on the basis of our present necessarily incomplete information and understanding concerning the complex pretrial problems with which Judge Pence and his colleagues have been assiduously struggling for a long time.

These considerations lead us to conclude that although paragraph 26 of Pretrial Order No. 15 clearly contemplates overlapping trials to some extent, this is not a matter with which this court can properly concern itself prior to the appeals, if any, which may be taken from final judgments entered in these antitrust actions.

Accordingly, the application for a writ in the nature of mandamus, to forbid the calendaring of substantially overlapping trials in these antitrust suits, or to provide the district court with guidelines to be followed in calendaring the cases for trial, is denied. The stay order herein is vacated. The motion to dismiss the appeals is denied as moot.

United States District Court, Western District of Washington, Southern Division, District of Oregon, Northern District of California, Central District of California, Southern District of California.

State of Washington, et al., v. American Pipe & Construction Co., et al. C.A. No. 3157, W.D. Wash., S. Div.

State of Oregon, et al., v. American Pipe & Construction Co., et al., C.A. No. 65-266 and related pipe case in the D. of Oregon bearing C.A. No. 65-299.

The State of California, et al., v. American Pipe & Construction Co., et al. C.A. No. 43403 and related pipe cases in the N.D. of Calif. bearing C.A. Nos. 43406-43407, 43729, 43752-43754, and 45001.

The City of Los Angeles, et al., v. American Pipe & Construction Co., et al. C.A. No. 65-911 and related pipe cases in the C.D. of Calif. bearing C.A. Nos. 65-913, 65-914, 66-655 -66-659, and 66-1024.

City of San Diego, et al., v. American Pipe & Construction Co., et al. C.A. No. 3396 and related pipe cases in the S.D. of Calif. bearing C.A. Nos. 3525 and 3528.

PRETRIAL ORDER NO. 17

A pretrial conference having been held on May 22, 1968; counsel having been heard; and due deliberation having been given, it is hereby ORDERED severally in each of the above actions that:

1. This order bears the titles or court file numbers and relates solely to claims for relief in each of the above-captioned actions;

2. A duplicate of this order shall be filed in each of the following cases and shall have the same effect as an original hereof. The docket pages of each such action shall be deemed incorporated by reference in and form a part of, the docket pages of each of the above actions pending in the same district court. This order shall be incorporated by reference, and shall form a part of the court files, for all purposes in each such other action:

Western District of Washington, Southern Division:	Civil No. 3157
District of Oregon:	Civil No. 65-266
Central District of California:	Civil No. 65-911
Southern District of California:	Civil No. 3396-SD-C
Northern District of California:	Civil No. #43403

3. Reference herein to "plaintiffs" is solely to the plaintiff or plaintiffs named in each particular action to which this order applies, and reference herein to "defendants" is solely to the defendant or defendants who have heretofore been served or have appeared in such action.

4. Two copies of any motion, brief or other document filed in any of the above-captioned actions pursuant to the provisions of this order shall be marked "COPY" and promptly sent via air mail, bearing the date of filing, addressed as follows:

Honorable Martin Pence, Chief Judge
United States District Court
P. O. Box 19
Honolulu, Hawaii 96810

5. This order supercedes all previous orders of the court insofar as they may be inconsistent with the provisions hereof.

6. Plaintiffs' motion for leave to file a supplemental trial brief regarding interstate commerce (dated April 9, 1968) is herewith granted. Plaintiffs' Trial Brief Supplement Concerning Interstate Commerce, attached to said motion, shall hereby be deemed filed, and is made a part of plaintiffs' trial brief (filed on November 3, 1967).

7. On or before May 31, 1968, defendants shall file a detailed written supplemental trial brief containing separately numbered paragraphs and setting forth:

A. The facts which defendants expect to prove in rebuttal of plaintiffs' trial brief supplement concerning interstate commerce, distinguishing between those facts which defendants contend, on the basis of the answers, plaintiffs' brief or otherwise, are admitted and those which are contested;

B. The legal issues, contentions, and supporting authorities related to the defense of plaintiffs' supplemental brief on interstate commerce.

8. On or before May 31, 1968 defendant American Pipe & Construction Co. shall file a detailed written memorandum and offer of proof, containing separately numbered paragraphs, and setting forth the evidence defendant intends to offer at trial relating to the costs and/or profits or losses incurred by American, or any other producer of concrete or steel conduit pipe, in the manufacture of the products covered by the complaints herein. Defendant's memorandum and offer of proof should specifically include statements as to (A)

whether actual production costs are the costs which would have been incurred absent the alleged conspiracy, and (B) whether admission into evidence of American's cost and/or profit or loss data should be dependent upon the offer and admission into evidence of comparable data for one or more other concrete and/or steel conduit pipe manufacturers.

9. On or before August 16, 1968 plaintiffs shall file a detailed written response to American's offer of proof as provided by paragraph 8 hereof, containing separately numbered paragraphs and setting forth:

A. The facts which plaintiffs expect to prove in rebuttal of American's offer of proof concerning cost and/or profit or loss evidence, distinguishing between those facts which plaintiffs contend are admitted and those which are contested; and

B. The legal issues, contentions and supporting authorities related to defense of American's offer of proof.

10. On or before May 31, 1968 defendants shall designate those portions of any deposition which they expect to read into testimony at the trial, and shall file written objections to deposition testimony designated by plaintiffs pursuant to Pretrial Order No. 15.

11. On or before June 14, 1968, plaintiffs shall counter-designate those portions of any deposition which they expect to read into testimony at the trial in rebuttal of portions designated by defendants pursuant to paragraph 10 hereof, and shall file written objections on the margin of the deposition testimony designated by defendants pursuant to paragraph 10.

12. On or before June 21, 1968, plaintiffs and defendants shall file written objections to documentary evidence previously designated or identified for introduction at trial.

13. On or before June 26, 1968, defendants shall file written objections to plaintiffs' counter-designations of deposition testimony.

14. On or before July 1, 1968, plaintiffs and defendants shall file:

A. Witness lists, indicating whether each witness will be presented by live or deposition testimony;

B. Proposed questions for the *voir dire* examination;

C. Proposed instructions to the jury on the law of the case;

D. Proposed special interrogatories to the jury;

E. The court copies of designated deposition testimony containing each party's objections to said designated testimony written in short form in the margin opposite the relevant language;

F. Proposed summaries of the contentions of the parties to be read to the jury.

15. On or before July 1, 1968, plaintiffs and defendants shall file all requests for admissions of facts or of the genuineness of documents.

16. On or before June 10, 1968 defendants shall furnish plaintiffs with a computer print-out of the mechanical errors which defendants contend plaintiffs made in plaintiffs' economic study in the transfer of information from factory orders of manufacturers other

than American Pipe & Construction Co. to coding sheets.

17. On or before June 24, 1968 defendants shall file a statement which verifies or challenges (with all necessary explanation) that the computer programs employed in plaintiffs' economic study (A) accurately express plaintiffs' program logic, and (B) accurately implement that logic.

18. On or before July 1, 1968 the parties shall confer (with appropriate technical and expert personnel present) regarding the validity of (A) the corrections referred to in paragraph 16 hereof, and (B) any challenges to plaintiffs' logic and programming pursuant to paragraph 17 hereof.

19. On or before July 24, 1968 defendants shall file a detailed written statement, comparable to that required of plaintiffs by paragraph 20 of Pretrial Order No. 16, setting forth the economic, statistical and engineering theories employed by defendants in defense of plaintiffs' damage proof, stating separately each judgment, and the underlying reasons therefor, on which defendants will rely in rebutting plaintiffs' theory or in offering affirmative evidence.

20. On or before July 3, 1968 defendants shall have completed deposing Dr. Bayard Wheeler, one of plaintiffs' economic experts.

21. On or before July 24, 1968 defendants shall produce in Los Angeles, California, the results of all polls, samples, summaries, surveys or computer runs which they propose to offer into evidence at trial. Defendants shall further make available to plaintiffs duplicates of all raw data, work sheets and computer inputs and

outputs from which such polls, samples, summaries, surveys or computer runs have been prepared.

22. Failure to comply with the provisions of paragraph 21 hereof shall preclude defendants from introducing into evidence at trial the results of any polls, samples, summaries, surveys, computer runs or raw data, work sheets and computer inputs and outputs for which such failure has occurred.

23. On or before July 29, 1968 defendants shall make an oral explanation to plaintiffs' technical and expert computer personnel of all materials used in or generated by their economic study, and the methodology employed in implementing such study.

24. On or before August 30, 1968 plaintiffs shall have completed deposing defendants' economic experts.

25. On or before August 30, 1968 plaintiffs and defendants shall make available for inspection all visual aids representing materials produced pursuant to this and all prior pretrial orders for their respective cases in chief.

26. Any portion of the deposition testimony and any document which is not designated by the parties in accordance with this and all prior pretrial orders shall be deemed abandoned and withdrawn unless the court shall otherwise authorize in the interest of justice; *provided,* however, that this exclusion shall not apply to evidence introduced by one party which is relevant to the testimony of a live witness produced by the other party.

27. A pretrial conference is set for August 7, 1968 at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or

such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (A) select the case(s) for trial; (B) select the district(s) in which any such trial(s) will be held; (C) determine the judge to preside in any such district; (D) determine whether other cases pending in any such district should be consolidated for trial; (E) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of overlapping trials, with the first trial to commence no later than September 3, 1968, and with any succeeding trial to commence thereafter at intervals of not less than two weeks each; and (F) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

A. The *voir dire* examination;

B. The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

C. The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

D. Jury instructions and special interrogatories;

E. Counsels' opening statements;

F. The days and hours of the week during which court will be conducted;

G. Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

H. Daily trial transcripts;

I. A current index of the trial record;

J. The handling of documentary evidence at trial;

K. The scope of testimony of witnesses to be called at trial and possible use of narrative summaries or verbatim extracts;

M. The parties' report on their attempts to stipulate as to facts;

N. Further pretrial proceedings;

O. Rulings on objections to designated deposition testimony and documentary evidence, where possible;

P. Possibility of settlement.

No. 287
No. 516 (Misc.)

FILED
AUG 9 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

THE STATE OF CALIFORNIA, *et al.*,
Respondents,

AMERICAN PIPE AND CONSTRUCTION CO.,
Petitioner,

vs.

HONORABLE MARTIN PENCE,
Respondent.

BRIEF IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, Motion for Leave to File Petition for a Writ of Prohibition or Mandamus and Petition for a Writ of Prohibition or Mandamus.

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BRIEF IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit or, in the alternative, Motion for Leave to File Petition for a Writ of Prohibition or Mandamus and Petition for a Writ of Prohibition or Mandamus.

QUESTION PRESENTED

Petitioner has incorrectly stated the question which it seeks to have this Court review. A more accurate statement of the question is:

> Whether this Court will review an Order which proposes, but does not establish with finality, trial dates in related antitrust cases pending in several District Courts, where the

District Judge to whom the cases have been assigned has closely supervised pretrial proceedings for a period exceeding three years, and is familiar with the status of the cases and with most of the evidence which is to be proffered by the parties.

STATEMENT OF THE CASE

This Petition stems from 27 separate civil antitrust suits which were filed and are now pending in five United States District Courts in California, Oregon and Washington. The cases were filed during late 1964 and early 1965. The Plaintiffs, which number approximately 350, are municipalities and other public entities.

Petitioner is the sole defendant affected by the Question raised in the Petition. An individual is named as a defendant in two of the actions; but both of these actions are filed in a single District.[1] These cases will doubtless be consolidated. There is nothing in the Record to indicate that the individual will be involved in more than one trial.

Pursuant to 28 U.S. § 291(c), all of these cases were assigned to Judge Martin Pence, a Respondent herein; and since March 1965 extensive discovery and other pre-trial proceedings have been conducted under the supervision and at the direction of Judge Pence. The cases have not as yet been consolidated for any purpose, but the pre-trial proceedings, including discovery, in all cases, have been conducted jointly and simultaneously.

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1. These actions are: *San Jose Water Works vs. American Pipe and Construction Co.*, N.D. Cal. No. 43752; *California Services Co. vs. American Pipe and Construction Co.*, N.D. Cal. No. 43753.. The individual defendant has not been served and was not a party in the Court of Appeals. No question concerning the individual defendant was raised in the Court below.

It is not expected, obviously, that Judge Pence must conduct the trial of all of these 27 cases, even if the number of trials should be reduced by consolidation. The various Orders and other proceedings since November 1966 contemplete, at least for the time being, trials in three Districts, conducted by three separate District Judges, including Judge Pence. It is expected that each trial will dispose of some or all of the actions pending in or transferred to the District of trial, pursuant to appropriate Order for consolidation. No designation has yet been made of the cases to be consolidated, the Districts in which the trials shall be conducted, or the District Judge who shall preside in each trial. It is contemplated, however, that Judge Pence will conduct a trial and that trials will be conducted by Judge Alfonzo Zirpoli (N.D. Calif.) and Judge George Boldt (W.D. Wash.).

No objection is raised by Petitioner to the consolidation of cases for three trials, or to the proposal for assignment of Judge Zirpoli and Judge Boldt to preside at two of the trials. Nevertheless, Petitioner urges in its Statement of the Case that "one consolidated trial would best serve the interests of justice and judicial economy." (Pet. p. 4) If Petitioner intended this to be part of its argument, we think, as did Judge Pence (R. p. 274), that no response is required other than to invite the Court's attention to the obvious impracticality of trial by jury of 27 consolidated antitrust damage actions involving approximately 350 separate Plaintiffs.

Judge Pence is unique in his knowledge of the pre-trial proceedings in these cases. He has conducted pre-trial hearings almost monthly since

March 1965. He has read some or all of the depositions which will be offered to prove the alleged conspiracy. He has entered Orders designed to expedite trial proceedings, such as (for example) an Order directing the marking of portions of depositions to be read, together with written objections to be raised at the trial. He has required the parties to prepare and submit detailed trial memoranda containing summaries of both fact and law. At his direction, proposed Jury Instructions and *voir dire* questions have already been submitted. Judge Pence and his Administrative Assistant have conferred with the expert witnesses of Plaintiffs and Defendant on the subject of Damages (involving, in these cases, sophisticated computer programs) so that the trial Judges may better understand and make rulings concerning the Damage theories of the parties. He has had an opportunity to observe the number and assess the competence of Petitioner's staff of attorneys. These details of Judge Pence's attention to these cases are only illustrative; but they demonstrate that he is peculiarly competent to estimate the length of the coming trials and to evaluate the problems, both theoretical and practical, which require solution.

The question of trial dates was first discussed by Judge Pence in a letter dated November 28, 1966. (R. p. 244). In the letter, Judge Pence proposed that discovery in all cases be conducted simultaneously; and he remarked that this would result in all cases being ready for trial at the same time. He further stated that he was "considering . . . holding practically simultaneous trials" in Seattle, San Francisco, and Los Angeles.

At the next Pretrial Hearing, held on December

14, 1966, Mr. Jansen, principle counsel for Petitioner, discussed the Court's proposal for trial dates. Assuming, apparently, that the proposal meant that the Court intended to set all the trials for commencement on the same date, Mr. Jansen stated (R. p. 246):

> "If I understand your Honor's suggestion, it is that Pre-Trial proceedings and trials proceed simultaneously in Seattle before Judge Boldt, here in San Francisco before Judge Zirpoli and in Los Angeles before your Honor."

To this, Judge Pence replied (R. p. 246):

> "You haven't stated it quite exactly as it is, but you proceed with what you have to say."

Mr. Jansen went on to state (R. p. 248):

> "I personally and no one but me is going to try every one of these cases . . ."

A few moments later, the following colloquy took place between the Court and Mr. Jansen (R. p. 250):

> "MR. JANSEN: Well, I hope your Honor understands that I am not here to challenge anything. I am here this morning to plead with your Honor to give serious consideration to my situation and not split me up into three persons.
>
> THE COURT: Well, as I have listened to the basis of your situation, it appeared purely financial; namely, that you had recommended to the company that you now represent with some thirty-five million dollars in assets—and I assumed that that is net—that they were spending a half a million dollars a year and all I can say is any firm with thirty-five million dollars can afford to have more than one, two or three lawyers represented in these cases here.

MR. JANSEN: There were other considerations besides financial.

THE COURT: Undoubtedly there were but you mentioned financial. When I look at the financial—you see, actually, I feel by the means which this court and this circuit is adapted to trying to move all cases forward, we have as a matter of fact saved your company as well as some of the other defendants perhaps more than a half million dollars, because it would have been necessary for you to have counsel practically in every district where these cases could be tried and that has been—

MR. JANSEN: I understand, your Honor."

The concept of conducting more than one trial at approximately the same time did not originate with the Plaintiffs. Judge Pence explained its origin in a colloquy with Mr. Jansen at the pretrial hearing on February 3, 1967. The Court stated (R. p. 270-272):

"Mr. Jansen, in order to make sure that the record is straight, the purpose of the three-judge idea could not have been to clobber the defendants or yourself in submission because the purpose behind the three-judge, three-trial idea was to give justice to all parties, as the judge who proposed that idea—not counsel—felt it would bring justice to all.

The idea of simultaneous trials did not come from Mr. Blecher or any one plaintiff. The idea of the three simultaneous trials came rather from the experience of this judge, from the experience of Judge Robson, the experience of Judge Becker, the experience of Judge Boldt and from the other judges throughout the United States who had observed in the electrical cases a situation which resulted, when the cases were set for trial, one to follow another—one of the results which was ob-

served by the National Coordinating Committee on complex and multiple litigations especially set up for the electrical cases, was that the defendants were able to "pick off" the lesser plaintiffs whose cases were not moved forward into early trial.

* * *

Further study of the problem by the Court with the aid and assistance, as I say, of the judges on the National Coordinating Committee, led this court to the ultimate conclusion that the court, of its own volition, indicate to counsel that it felt that the only way in which these cases could be handled with fairness to the plaintiffs and fairness to the defendants and fairness to the public would be to have preparation of all cases for simultaneous trial with the idea that if any were settled out the remaining cases could be handled quickly and expeditiously thereafter.

So, to repeat, the idea of preparation for simultaneous trial was not one which was brought out and brought forth by the counsel for the plaintiffs, but rather brought forth by this judge after long study, as the record will show, after severe visceral disturbances brought upon final intellectual analyses of the whole posture of all of the cases, with the result heretofore indicated."[2]

After the above statement, Judge Pence entered Pretrial Order No. 9, dated February 21, 1967. Contrary to the apparent assumption of Petitioner, Pretrial Order No. 9 contains no provision for commencement of three trials at the same or approximately same time. The Order provides for a con-

2. Mr. Jansen's response to the Court's comment was to suggest that all the cases be tried at once in one trial. (R. p. 276.)

The factors which influenced the decision of Judge Pence to schedule three trials commencing at approximately the same time were set forth in his *Amicus Curiae* Brief, p. 13-17, in the Court of Appeals.

ference of three District Judges and further provides for the selection of "not less" than three cases for separate trials, for the designation of the Districts in which such trials will be held and for the designation of the Judge who will preside in each district.

Respondents never assumed that this Order meant that three trials would commence precisely at the same time. Respondents did assume that since the cases would be ready for trial at or about the same time, the trials would commence at about the same time, depending upon the convenience and calendar of the designated Judges and other considerations which would expedite the fair disposition of this large group of cases.

Petitioner, however, in the District Court as well as in the Court of Appeals, treated Pretrial Order No. 9 and subsequent Orders, as if they would require the commencement of three trials at exactly the same time.

Pretrial Order No. 10, Pretrial Order No. 11 and Pretrial Order No. 13 related to completely different subjects and contained no provision concerning designation of Judges or Districts, and nothing concerning a trial schedule.

Pretrial Order No. 12 and Pretrial Order No. 14 did contain paragraphs concerning designation of Judges and Districts similar to that contained in Pretrial Order No. 9, except that the date of the pretrial conference to consider these matters was postponed in each Order.

The proceedings which culminated in the Petition now before this Court commenced with a Notice of Appeal from Pretrial Order No. 14. The Notice was dated December 26, 1967. Like Pretrial Orders No.

9 and 12, it provided for a conference of Judges, but contained nothing concerning commencement of trials, except a provision that the trials would commence "at such time as the presiding judge shall determine" (Pet. p. 5-6).

While these cases were pending in the Court of Appeals, Pretrial proceedings in the District Court continued; and before submission of final Briefs and argument, Judge Pence, on February 26, 1968, entered Pretrial Order No. 15. That Order provided for a Pretrial conference to be held on June 5, 1968 (subsequently postponed to August 7, 1968) to be attended by Judge Pence, Judge Alfonzo Zirpoli, and Judge George Boldt. The Order then recited that:

> "At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968 [subsequently postponed to August 7, 1968], and *with each succeeding trial to commence thereafter at intervals of not less than two weeks each;* and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges." (Italics supplied)

It is the above Order which was ultimately considered by the Court below and challenged by the

Petition now before the Court. (Opinion below, p. 5).

Pretrial Order No. 15 was changed slightly by Paragraph 31 of Pretrial Order 16, and by Paragraph 27 of Pretrial Order No. 17, entered on May 28, 1968. The latter Orders contained changes in dates; and instead of providing that "not less than three" cases for separate trial, they provided that Judge Pence

> ". . . will (A) select the case(s) for trial; (B) select the district(s) in which any such trial(s) will be held."

Both Orders then provided for a final Pretrial order

> "setting such cases for trial at such times as will permit the orderly processing of overlapping trials, with the first trial to commence no later than September 3, 1968 [Par. 27, Pretrial Order No. 17], and with any succeeding trial to commence thereafter at intervals of not less than two weeks each; . . ."

Pretrial Order No. 17 is the last of a long series of Orders and other proceedings designed to bring these cases to trial.

The present status of the cases, therefore, is this: A Pretrial conference will be held on August 7, 1968; at that time a cases or cases will be set for trial on or before September 3, 1968, in some District or Districts; if more than one trial is scheduled, the trials may overlap, but no trial will commence less than two weeks following commencement of the next preceding trial.

SUMMARY OF ARGUMENT

The individual defendant referred to in the Petition is not affected by the challenged Order. The two cases in which he is named as a defendant are pending in a single District. There is no indication that he will be involved in concurrent or overlapping trials. He is not a Petitioner and the question of how concurrent trials might affect him, if at all, was not submitted to or decided by the Court below.

All of the cases have become ready for trial at the same time. It is impossible for one Judge to try them all. The Judge who will initially determine the trial dates is thoroughly familiar with the status of the cases.

The orderly administration of Justice requires multi-trials which may, to some degree not determined, involve concurrent trial proceedings.

But there is no showing that Petitioner will be prejudiced by trials which are partially concurrent or overlapping. The assertions of possible prejudice are based on speculation. And the District Judges to whom the cases are to be assigned for trial can protect Petitioner from prejudice because each trial Judge controls his own calendar. The Petition is therefore premature.

Petitioner has known since November 1966 that three or more trials might be required and that the trials might partially overlap. The Pretrial proceedings have resulted in unusually thorough preparation which will permit this without prejudice to the parties. There is no showing that Petitioner's large staff of attorneys can not competently conduct trials which might be partially con-

current. Lack of diligence on the part of Petitioner's attorneys which might make the procedure difficult or inconvenient provides no ground for interference with the orderly administration of Justice.

No facts warrant the conclusion or assumption that the orderly presentation of evidence will be hampered by trials which may partially overlap.

This Petition is based mainly upon the demand of one attorney for the right to conduct the trial of all cases. Petitioner has no right to insist that one attorney try all of the cases or participate in all trials, especially where, as here, such insistence would result in substantial and unnecessary delay to many Plaintiffs in the trial of cases which have been pending over three and one-half years.

ARGUMENT

I. Important Questions Are Not Presented.

A. No new technique is involved. (Answer to p. 8-12 of Petition).

In these cases, discovery and other Pretrial proceedings were conducted jointly in all actions. As Petitioner concedes, this is familiar procedure, recommended the Federal Judicial Conference and now adopted by statute. The application of this procedure in these particular cases has demonstrated its advantages. These complex cases—multi-party and multi-district in scope—have been brought by the assiduous efforts of Judge Pence to a stage of trial preparation which is rarely accomplished in the simplest of cases.

Neither is the proposed method of trial setting new or unique. Pretrial proceedings having been completed, Judge Pence now proposes that some

of the cases be assigned to other District Judges pursuant to 28 U.S.C. § 137. Once this is done, the cases will be under the control of the Judges to whom they are assigned, and the situation will be the same as if the cases had never been assigned to a single Judge for Pretrial proceedings. As the Court of Appeals stated (Opinion below, p. 7):

> "Moreover, if the further order to be entered . . . provides for substantially overlapping trials, such provision will not be binding upon Judge Pence or any other district judge to whom Judge Pence may transfer some of the cases, since every federal trial judge always retains control of his calendar."

It is true that Judge Pence contemplates overlapping trials and that his initial Order setting trial dates may result in some overlapping of trials, depending on the number of cases consolidated and the many other factors which affect the duration of trials. But these cases are ready for trial; and if at this moment they were pending, ready for trial, before five separate District Judges, we can be assured that the Judges would proceed to set them for trial[3] and that there would be considerable overlapping. And we are equally sure that no District Judge would or should let the cases in his court sit by indefinitely, simply to accommodate the desire of an attorney to try all of several cases, all ready for trial, in five separate District Courts.

However, in these cases, after the assignment to other Judges is made, the trial Judges have the power to modify the trial dates upon a proper and meritous application. Thus, the Court of Appeals stated (Opinion below, p. 7):

3. Rule 40, Federal Rules of Civil Procedure provides: "The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other party or (3) in such other manner as the courts deem expedient.

> ". . . an initial requirement for overlapping trials will be subject to reconsideration by the individual judges up to the dates of trial."

The only new or unique feature of these cases is the demand of one attorney, or one set of attorneys, that he, or they, personally try all of many protracted cases.[4] Such a demand is unreasonable, especially where, as here (*infra,* p. 19), the attorneys are involved in other and unrelated litigation.

B. Under the procedure which is proposed, but not finally established, all parties will be accorded a fair trial. (Answer to p. 13-16 of Petition).

At page 13 of the Petition, it is asserted that Petitioner can not receive a fair trial because of the trial schedule, which has been "ordered." The fact is, however, that no schedule has yet been ordered; and even after an initial order is made, it will be subject to modification before and during trial to insure that all parties will receive a fair trial. (See Opinion below, p. 6-8.) And it is presumptive to contend or assume that a request for a continuance or continuances will risk the "wrath of trial judges and . . . juries."[5] There is no basis for this argument either in the Record in these cases or on general trial principles.

Should trials overlap, no one will be handicapped

4. In the Electrical Equipment cases referred to by Petitioner the defense counsel were engaged *simultaneously* from coast to coast on many fronts: Trials; Court supervised depositions; Appellate proceedings; and miscellaneous pretrial proceedings. At one point, three *simultaneous* involving identical defendants trials were in progress.

5. In the proceedings so far in these cases, Petitioner's attorneys have never demonstrated such solicitude for the equanimity of the District Judge.

by the need for the same document or documents in two or more cases. The parties have already stipulated that copies may be used in place of original documents, and the ease and efficiency of document reproduction is a matter of common knowledge. Moreover, most of the documents which will be offered in evidence relate to damages, and consist of such things as purchase orders and invoices. Documents of this nature will only be required in one District.

The suggestion that there will be a problem about witness availability is without merit. We are not told, and nothing in the Record suggests, what witness or witnesses might be needed in more than one trial. But, in any event, the provision for delay between commencement of trials is designed to meet this problem, should it arise. And the refined state of preparation of these cases, which includes exchange of names of witnesses, permits the trial Judges to arrange the commencement and progress of the trials on a schedule which will avoid any problem of this nature.

In stating that "key persons" might make "crucial" suggestions during trial, Petitioner again asks Court indulge in speculation as to the identity of the "key persons" and the nature of the "crucial" suggestions which could conceivably be required after three and one-half years of intensive pretrial preparation—including exchange of documents, depositions, and detailed trial Briefs.

The argument (Pet. p. 15) that a "time lag" is proposed at the suggestion of Respondents, and for their sole benefit, and that it will not adequately protect Petitioner, is based upon a severe distortion and disregard of the Record. It was always con-

templated that trial commencement dates would be staggered, for the protection of all parties and for the purpose of conducting the trials in an orderly and expedient manner.

In its Statement of the Case (Pet. p. 7-8) Petitioner quotes part of a statement made by Mr. Ferguson (of counsel for Plaintiff-Respondents) during the Pretrial Hearing of September 7, 1967 (R. 280-288). At that time, it was thought that the cases would be ready for trial in about January 1968. In his statement, Mr. Ferguson suggested commencement of a trial on January 22, and commencement of a second trial on February 5. One of the reasons given by Mr. Ferguson for this lag in date of trial commencement was that a witness for Plaintiffs (Dr. Robert Lanzillotti) would thereby have time "between the various cases to prepare his evidence . . ." (R. p. 283). Petitioner, observing that all subsequent Orders include a provision for delay between commencement of trials, state that on the request of Plaintiffs, Judge Pence abandoned the plan of commencing the trials upon the same date and adopted a plan of staggered commencement dates. The implication is that Judge Pence altered his proposal to suit the convenience of Plaintiffs at the expense of Petitioner.

The quoted material, out of context, is misleading and inaccurate; and Petitioner's use of it is unfair and unjustified. Dr. Lanzillotti is the principle damage witness for Plaintiffs. His testimony will be lengthy and relatively complicated. His damage computations will vary, depending on the Plaintiff and purchase transactions. Respondent has repeatedly indicated its intention to vigorously challenge his conclusions, and technical experts as well as legal specialists have been employed to do so.

Without doubt these experts and specialists plan to attend the testimony of this witness, and intend to take time between cases to prepare cross-examination, just as Dr. Lanzillotti will take time to prepare his direct examination. It is well known to everyone connected with these cases that Dr. Lanzillotti is a critical witness, not only for the substance of his testimony, but for timing the progress of the trials. So, any time lag provided for the orderly testimony of Dr. Lanzillotti in all trials will correspondingly benefit Petitioner's witnesses and specialists.

The fact, however, is that no change in the plan for trial schedules resulted from Mr. Ferguson's comment about Dr. Lanzillotti. Judge Pence never directed or contemplated that trials should commence simultaneously or concurrently, in the sense that they should commence on the same day or even in the same week, and the Record warrants no assumption that any change in trial plan resulted from Mr. Ferguson's statement of September 7, 1967.[6] As early as February 3, 1967, Mr. Jansen knew that there would be flexibility in the concept of "simultaneous". At the pretrial hearing on that date, Mr. Jansen, referring to an Order of the Court on the subject, stated (R. p. 273):

> "But the order does make explicit that, come October 30, no less than three cases and no more than three cases — assuming there are three left—will commence between October 30 and December 18.
>
> That is the *flexible* feature. The specific feature is the fact that these three cases will go forward on an *approximately* simultaneous

6. The Court rejected the suggestion made at that time by Mr. Ferguson that there should be four trials. R. p. 286-287.

> basis, as your Honor's letter of December, 1966 indicated, and this fact and this obligation is now clearly and unequivocally known to American." (Italics supplied)

Next we come to the argument (Pet. p. 13) that multiple trials will require the utilization of attorneys who have not taken part in certain discovery proceedings. The specious nature of this argument is demonstrated by the fact that rarely, if ever, have all of Petitioner's staff attended Pretrial hearings and discovery proceedings. Moreover, Petitioner has known since November 1966 that there would probably have to be multiple trials, and neither the Courts nor Plaintiff-Respondents should be put to indefinite delay because of Petitioner's lack of diligence. And finally, Petitioner already has a staff large enough to permit the attendance, at overlapping trials, of one or more attorneys who have participated in Pretrial proceedings. (See *infra,* p. 19-20.)

The real and only problem in these cases is that one attorney, or one set of attorneys, demands the right to conduct every trial, no matter how many will be required and no matter what effect this demand may have upon the rights of others and the orderly administration of Justice. What is worse, they apparently demand the right to conduct other unrelated litigation at the same time! On December 14, 1966, Mr. Jansen represented to the Court (R. p. 251):

> ". . . it was my conclusion that to properly defend these cases, as I have done for example for Texaco in the past, a person must live these cases and these cases alone. One man in my judgment, if it please the Court, who devotes his entire time and efforts—sleeping and waking hours—all of that to these cases can do a

lot more and accomplish much more and I have learned this in twenty years of experience in anti-trust cases, when you have three or four men who have other obligations to other clients.

This is my purpose, if God gives me the strength and the endurance and a long enough life to do it. I am pleading with your Honor to give me an opportunity to do the job that I think I can do for my client. Thank you.

THE COURT: I will take your plea under consideration along with that of other parties involved."

At the very moment that Mr. Jansen was making this statement about devoting all of his "sleeping and working hours" to these cases, and no others, he was in fact involved in other and different litigation in the Central District of California, and he was being assisted by one of the firms associated with him in these cases. See *Industrial Building Materials v. Interchemical Corporation* (C.D. Calif.) 278 F. Supp. 938, decided December 26, 1967.[7] Mr. James Sullivan, who has been an active counsel for Petitioner, has also participated in other and unrelated litigation.[8]

Also, during 1968, Mr. Jansen and some of his associates have participated in litigation pending in other District Courts and not related to this Petition, but based on similar claims and involving the same industry.

Despite the absences of Mr. Jansen and Mr.

7. The case is now on appeal. See Notice of Appeal, Appendix A.

8. In February 1965 Mr. Sullivan became involved in *Herrman v. Texaco, Inc.*, a case filed in the United States District Court for the Western District of Washington, Civil Docket No. 6375. Mr. Sullivan participated in the trial of the case, which commenced on or about May 22, 1968 and continued through June 29, 1968. See Appendix B.

Sullivan, pretrial preparation of these cases continued. Some of the work has been carried on by Mr. Sullivan, some by a San Diego firm which became associated in the cases in early 1967, and some by a New York firm which became associated at least as early as October 1967.

C. There are compelling reasons for the setting of trial dates, despite the fact that the trials might overlap. (Answer to p. 16-19 of Petition).

The principle reason for setting these cases for trial, whether or not some portions of the trials might proceed concurrently, is that the cases are ready for trial, and the orderly administration of justice and fairness to the Plaintiffs require that they be disposed of with reasonable expediency and without indefinite delay caused by the capricious demand of an attorney who wants to personally conduct the trial of each case. Even in criminal cases, a defendant may not insist upon personal choice of counsel, where the effect would be to interfere with and obstruct the administration of justice. *Majeske v. U.S.*, 266 F. 2d 942 (9 Cir. 1959); *Williams v. U.S.*, 203 F. 2d 85 (9 Cir. 1963) Cert. Denied 345 U.S. 1003; In *United States v. Arlen*, 252 F. 2d 491 (2 Cir. 1958).

It is correct that Petitioner has suggested alternative trial plans. One proposal was that there be one single trial for all of the 300-plus Plaintiffs in the 27 separate actions. Another proposal was to sever the liability and damage issues, a plan which would leave the element of impact somewhere in limbo. These proposals are manifestly impractical. Nevertheless, they were patiently and carefully evaluated by Judge Pence. Alternative suggestions

made by Plaintiff-Respondents were also considered and rejected. It is most unfair to assert that Judge Pence "acceded" to the wishes of Respondents, because the plan which Petitioner complains of was originated by Judge Pence himself, not by Respondents. (*supra*, p. ....)

Petitioner says (Pet. p. 17) that seriatim trials would not involve unconscionable delay. Eight to twelve weeks is a reasonable estimate for the duration of one of these trials. At this rate, some of the Plaintiffs might be required to wait two more years for trial of cases which were filed in late 1964. Some Plaintiffs, whose cases might not be appropriate for consolidation, might have a waiting period of three years. And seriatim trials would establish an awkward precedent for subsequent trial Judges to confront.

It is outrageous to argue that Judge Pence is attempting to force Petitioner to settle these cases. That this argument is based upon a mere "inference" (Pet. p. 17) makes it even worse. Counsel's obsessive persistence to play the lead in all three acts should not be utilized as a weapon against Judge Pence.

II. The Questions Raised by the Petition Are Not Properly Before the Court. (Answer to p. 20-22 of Petition).

Assuming that more than one trial will be scheduled, the commencement dates are as yet undetermined; and while there may be overlapping of trials, the extent of the overlapping, if any, can not now be determined and the logistic problems cannot yet be evaluated. The problems urged by Peti-

tioner, if any problems really do exist, are purely speculative and highly exaggerated. For example, there is not the slightest basis for the statement (Pet. p. 21) that "the two consulting trial Judges are in full sympathy with the concept of simultaneous trials." This assertion by Petitioner is fabrication.

As the Court of Appeals pointed out, the Order involved in this Petition is not in any sense a final Order, and it can be modified, changed and qualified should there be any good reason for doing so.

The Petitions are, therefore, premature. See *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1942); *Cobbledick v. United States,* 309 U.S. 323 (1939).

CONCLUSION

Both the Petition and the Alternate Petition should be denied.

Respectfully submitted,

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FILED

JAN 23 1968

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
L. Shellman DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

INDUSTRIAL BUILDING MATERIALS, INC., a corporation,

Plaintiff,

vs.

INTERCHEMICAL CORPORATION, a corporation, and MARTIN-MARIETTA CORPORATION, a corporation,

Defendants.

NO. 64-432 AAH Civil

NOTICE OF APPEAL

Notice is hereby given that plaintiff Industrial Building Materials, Inc. in the above-captioned action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on December 26, 1967.

GEORGE W. JANSEN
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San Diego, California 92101

PAUL B. WELLS
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By George W. Jansen
Attorneys for Appellant

DATED: January 23, 1968

2986

Copy of the within Notice of Appeal received this 23rd day of January, 1968.

McCUTCHEN, BLACK, VERLEGER & SHEA

By J. Richard Haley
Attorneys for Defendant
Interchemical Corporation

SHEPPARD, MULLIN, RICHTER & HAMPTON

By Carlton C. Taylor
Attorneys for Defendant
Martin-Marietta Corporation

A TRUE COPY:
ATTEST: JUL 31 1968
W. B. LUCK, Clerk
By William E. Wilson
William E. Wilson, Chief Deputy

CIVIL DOCKET ~~TRANSFERRED TO~~ ~~WILLIAM J. LINDBERG~~ **6375**

UNITED STATES DISTRICT COURT — Jury demand date: Feb. 8, 1965 by Pltff. — RETRANSFERRED TO: WILLIAM J. LINDBERG

C. Form No. 105A Rev.

TITLE OF CASE	ATTORNEYS
GEORGE F. HERRMAN and MAGDALENA HERRMAN, his wife; VERNON J. McKALE and VICTORIA A. McKALE, HIS WIFE; CLYDE A. McKALE and EVELYN V. McKALE, his wife' and JAMES Q. RONALD and CLEO K. RONALD, his wife; on behalf of themselves and others similarly situated v. TEXACO, INC., a Delaware corporation	For plaintiff: Ronald E. McKinstry, Peter D. Byrnes, Bogle, Bogle & Gates For defendant: Pendleton Miller Grosscup, Ambler, Miller & Lawrence Admitted specially for this case: James O. Sullivan also for Texaco-William J. Walsh, Jr. & John Lackland. NEW ADDRESS FOR: James O. Sullivan 110 Laurel St. San Diego, Cal. 92101 (714) 233-6391

Cf in 2 drawer filing cabinet

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J. 5 mailed	Clerk			1965					
				Feb. 3	Grosscup, Ambler, Lawrence	15	00		
J. 6 mailed	Marshal			Feb. 5	Dep Tr. U.S. CD #124.			15	00
Cause of Action:	Docket fee								
Breach of agreement to purchase stock, damages for loss incurred in sale to another at less price. (McKale's)	Witness fees								
	Depositions								

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DATE	PROCEEDINGS	Date Order Judgment I
1965		
Feb. 3	Filed Petition for Removal from Superior Court of King County, Complaint and Summons attached. (1)	
"	Filed Bond for removal $250. Travelers Indemnity Co. (2)	
Feb. 8	Filed Plaintiff's demand for jury trial. (3)	
"	Filed Plaintiff's notice of taking depositions, New York, Los Angeles and San Francisco, John Mingay and others. (4)	
"	Filed Defendant's answer. (5)	X
"	Filed Defendant's notice of taking depositions Vernon McKale and three. (6)	
Feb. 9	Filed Plaintiffs' motion to stay defendant's discovery until completion of plaintiff's discovery, due to prior notice. (7)	
"	Filed memorandum in support of above motion (8) and affidavit of Peter D Byrnes (9).	
"	Filed notice of hearing motion Feb. 15, 1965, 9:30 a.m. (10)	
Feb. 9	Ent. order granting plaintiff's motion to set February 16, 1965, 9:30 a.m. as time for hearing plaintiff's motion to stay taking of depositions.	
Feb. 11	Motion to stay discovery reset for hearing Feb. 12, 1965, 2 p.m. on request defendant.	
Feb. 12	FiledDefendant's motion for continuing hearing on motion to stay. (11)	
"	Ent. order admitting James O. Sullivan specially to appear in this case on the oral motion of Pendleton Miller.	
"	Ent. record of hearing on discovery procedure. After argument, the matter is continued to Bebruary 16, 1965, 4:00 P.M.	
"	Filed Affidavit of Ronald E. McKinstry and Peter D. Byrnes in Reply to Defend nt's Motion for Continuance. (12)	
Feb. 16	Ent. order striking further hearing on discovery procedure from calendar on request of Pendleton Miller with consent of counsel, matter agreed upon.	
"	Filed Stipulation Regarding Depositions and Other Discovery. (13)	
Feb. 26	Filed Plaintiffs' Motion for Production of Documents. (14)	
"	Filed Plaintiffs Notice of hearing above motion on March 8, 1965 at 9:30 A.M. (15)	
Mar. 3	Filed Defendants Memo. of Points & Authorities in Opposition to Plaintiffs' Motion for Production of Documents. (16)	
" 11	Filed Affidavit of Pendleton Miller in Opposition to Plaintiffs' Motion for Production of Documents. (17)	
March 8	Filed Order Regarding Production of Documents by Defendant. (18)	
Apr. 19	Ent order for assignment Aug. 2, 1965 11 am.	
May 7	Filed application of George W. Jansen, non-resident counsel for permission to participate on behalf defendant. (19)	
May 11	Filed order on motion for production of documents. (20)	
July 6	Filed order for production of documents. (21)	
Aug. 2	Ent. order for assignment Nov. 8, 1965 11 a.m.	

DATE	PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	AMOUNT REPORTED ON ENCLOSURE RETURNS
1965				
Nov. 3	Filed Defendant's motion for production of documents.		(22)	
"	Filed affidavit of George W. Jansen in support of motion.		(23)	
"	Filed memorandum of authorities.		(24)	
"	Filed notice of hearing motion for production and other motions Nove. 15, 1965, 9:30 a.m.		(25)	
Nov. 15	Ent. order for assignment March 7,1966 11 a.m.			
"	Ent. order admitting George W. Jansen specially on behalf defendant.			
"	Ent. order denying deft. motion to produce, after argument.			
1966				
Mar. 7	Ent. order for assignment July 1, 1966 10 a.m.			
Mar. 16	Filed Defendant's Motion for Protective Order.		(26)	
"	Filed Affidavit of George W. Jansen.		(27)	
"	Filed Defendant's Memorandum of Points & Authorities.		(28)	
"	Filed Defendant's Notice of hearing motion for protective order, March 25, 1966, 9:30 A.M.		(29)	
Mar. 21	Filed Memorandum of Points and Autho. in Opp. to Defendant's Motion for a Protective Order.		(30)	
Mar. 25	Filed Plaintiffs' First Interrogatories to Defendant.		(31)	
"	Ent. record of argument on deft. Texaco's motion for protective order. Continued to April 1, 1966 9:30 A.M. for decision.			
Mar. 29	Filed Deft: Texaco's Posthearing Memorandum of Points and Authorities on Motion for Protective Order Concerning Transcripts of Depositions.		(32)	
Apr. 1	Filed memorandum decision requiring plaintiffs to pay cost of original transcript on depositions unless parties agree otherwise.		(33)	
"	Ent. record of hearing on written opinion. Court states written opinion will stand as signed.			
Apr. 15	Filed Defendant's answer to first interrogatorie.		(34)	
June 24	Filed Plaintiffs' notice of taking deposition Augustus C. Long.		(35)	
July 1	Ent. order for assignment Oct. 21, 1966 10:30 a.m.			
July 13	Filed stipulation re discovery procedure.		(36)	
Aug. 19	Filed Stipulation regarding Discovery proceddre re depositions of Augustus C. Long et al.		(37)	
Oct. 21	Ent. order for assignment Feb. 10, 1967 10:30 a.m.			
Dec. 14	Filed Deposition of Augustus C. Long, behalf of pltfs.		(38)	

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DATE	FILINGS—PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	AMOUNT REQUIRED IN EXCLUSIVE RETURNS
1967	Lane, Powell, Moss and Miller and James O. Sullivan in place of			
Feb.9	Filed substitution of attorneys-George W. Jansen withdrawn (39)			
Feb. 10	Ent. order for assignment June 23, 1967 10:30 a.m.			
June 23	Ent. order for assignment Sept. 15 1967 2 p.m.			
Sept. 15	Ent. order setting trial for May 21, 1968. Ent. order setting pretrial for March 22, 1968 at 2 p.m.			
Nov. 7	Filed Stipulation for Filing of Amended Complaint and Amended Answer.		(40)	
Nov. 7	Filed Amended Complaint.		(41)	
Nov. 7	Filed Answer of deft. Texaco to Amended Complaint.		(42)	X
Nov. 7.	Filed Notice of Association of Additional Attorneys representing Texaco, Inc. William J. Walsh Jr. and John Lackland are associated with Pendleton Miller and James O. Sullivan.		(43)	
Nov. 7	Filed defendant Texaco's Interrogatories Set. No. 1.		(44)	
Nov. 15	Filed change of address of deft. Texaco's counsel, James O. Sullivan.		(45)	
Nov. 16	Filed stipulation and order extending time to answer and/or object to defendant's interrogatories-to and including December 18, 1967.		(46)	
Dec. 14	Filed stipulation regarding defendant's interrogatories.		(47)	
Dec. 19	Filed answers of Clyde A. McKale to deft.'s interrogatories set No. 1.		(48)	
Dec. 19	Filed answers of Vernon J. McKale to deft.'s interrogatories set No. 1.		(49)	
Dec. 19	Filed answers of James Q. Ronald to deft.'s interrogatories set No. 1.		(50)	
Dec. 19	Filed answers of George F. Herrman to deft.'s interrogatories set No. 1.		(51)	
Dec. 19	Filed answers of Benjamin L. Burroughs to deft.'s interrogatories set No. 1.		(52)	
Dec. 19	Filed answers of Wylie M. Hemphill to deft.'s interrogatories set No. 1.		(53)	
1968				
Jan. 8	Filed deposition of George F. Herrman-behalf of deft.		(54)	
Jan. 11	Filed plaintiffs' answers to Texaco Inc.'s interrogatories: Gertrude H. Larson (55); Maude E. Jacobs (56); Luella C. Hamilton (57); Carl O. Dakan (58); Robert Tompkins (59); Kathryn B. Wille (60); Cleo K. Ronald (61); Jeannette L. Mikesell (62); Evelyn V. McKale (63); Kenneth C. May (64); B. H. Lundberg (65); Mrs. J. E. Lockyer (66).		(55)	
Mar. 13	Entered order transferring cause to Judge Bowen for Trial.			
Mar. 13	Entered order advancing trial date to May 20, 1968. Pretrial hearing set for April 19, 1968 at 2:00 P.M. before Judge Lindberg. (If Court cannot reach, then hearing will be on April 26, 1968 at 2:00 P.M.) Counsel notified.			
Mar. 29	Filed Plaintiff's Notice of Taking Deposition-John I. Mingay.		(67)	
Apr. 1	Filed Defendant's Motion to Vacate Plaintiffs' Notice of Taking Deposition of John I. Mingay, and to stay taking of Such Deposition until April 29 or thereafter.		(68)	
"	Filed Affidavit of William J. Walsh, Jr. re deposition of Mingay.		(69)	
"	Filed Notice of hearing above Motion on April 12, 1968.		(70)	
Apr. 2	Filed Defendant's Second Interrogatories.		(71)	

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED ON ENROLLMENT RETURNS
1968				
Apr. 2	Filed affidavit of Peter D. Byrns, of counsel for the plaintiffs, re taking deposition of John I. Mingay.		(72)	
Apr. 3	Entered Record of Hearing defendant's motion to vacate and stay the taking of the oral examination of John I. Mingay. Counsel to arrange time of examination between themselves.			
Apr. 3	Entered order setting April 26, 1968 for pretrial hearing. Pretrial date of April 19, 1968 is stricken. Prospective Pretrial Order to be lodged by April 22, 1968.			
Apr. 4	Filed Defendant's Motion for Production of Documents.		(73)	
Apr. 4	Filed Affidavit of James O. Sullivan in Support of Defendant's Motion for Production of Documents		(74)	
Apr. 4	Filed Defendant's Notice of Hearing Motion for Production of Documents on April 12, 1968 at 9:30 A.M.		(75)	
Apr. 4	Filed Order Re Taking of Deposition of John I. Mingay.		(76)	
Apr. 5	Filed Defendant's Third Set of Interrogatories		(77)	
Apr. 8	Ent. order continuing hearing on Motion for Production by Defendant to Apr. 26, 1968 at 2:00 P. M.			
Apr. 10	Filed Affidavit of Service by Defendants re Motions.		(78)	
Apr. 12	Filed Plaintiffs' Objections to Defendants' Second and Third Interrogatories.		(79)	
Apr. 12	Filed Memorandum of Authorities in Support of Plaintiffs' Objections to Interrogatories.		(80)	
Apr. 12	Filed Plaintiffs' Memorandum of Authorities in Opposition to Defendants' Motion for Production of Documents.		(81)	
Apr. 12	Filed Defendant's First Supplemental Request for Admissions.		(82)	
"	Filed Defendant's Motion re Class Action Determination.		(83)	
"	Filed Defendant's Notice of hearing above motion, 4/26/68 at 2:00 P. M.		(84)	
Apr. 19	Filed Defendant's Motion for Leave to Amend Answer to Amended Complaint.		(85)	
Apr. 22	Filed Defendant's Request for Admissions.		(86)	
Apr. 22	Filed Stipulation and Order Extending Time to Answer and/or object to Defendant's First Supplemental Request for Admissions.		(87)	
Apr. 23	Lodged Proposed Pretrial Order.			
Apr. 23	Lodged Defendant's Suggested Additions to the Pretrial Order.			
Apr. 24	Filed Plaintiffs' Motion to Strike Certain Contentions and Issues by Defendant from the Pretrial Order.		(88)	
Apr. 24	Filed Memorandum in Support of Plaintiffs' Motion to Strike Certain Contentions by Defendant from Pretrial Order.		(89)	
Apr. 24	Filed Plaintiffs' Memorandum of Authorities Re: Defendant's Motion for Class Action Determination.		(90)	
Apr. 24	Filed Deft.'s Second Supplemental Request for Admission.			(91)
Apr. 25	Filed Affidavit of Service on Deft.'s Motion to amend answer.			(92)
Apr. 26	Filed Defendant's Memorandum re Proposed Pretrial Order.			(93)
"	Ent. record of PRETRIAL HEARING. Counsel to institute any more discovery by May 2 and completed by May 8th.			
"	Ent. order granting deft/s motion for production of documents.			

DATE 1968	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
Apr. 26	Ent. order ruling this is a class of action that comes under R23(b)(1)(B), after argument.			
"	Ent. order setting further pretrial hearing for May 15, 1968, 2:00 P.M. Plaintiff's Brief to be filed by May 15th and defendant's by May 17th. Counsel to exchange list of exhibits by May 10th, 1968. Voir dire instructions by May 17th and defendant's motion for summary judgment to be filed by May 15th.			
Apr. 29	Filed Plaintiffs' Objections to Defendant's Request for Admissions			
Apr. 29	Filed Affidavit of Peter D. Buyrnes in Support of Plaintiffs' Objections to Defendant's Request for Admissions.			
Apr. 29	Filed Plaintiffs' Objections to Defendant's First Supplemental Request for Admissions.			
Apr. 29	Filed Plaintiffs' Answers to Certain of Defendant's First Supplemental Request for Admissions.			
Apr. 29	Filed Plaintiffs' Answers to Defendant's Second Set of Interrogatories.			
Apr. 29	Filed Plaintiffs' Answers to Defendant's Third Set of Interrogatories.			
Apr. 29	Filed Plaintiffs' Answer to Defendant's Second Supplemental Request for Admission.			
May 2	Filed Deposition of Benjamin L. Burroughs-behalf of deft.			(101
May 6	Filed Deposition of Charles Edward Rathbone taken by deft. with exhibits.			(102)
May 7	Filed deposition of Wiley M. Hemphill taken by deft.			(103)
May 9	Filed deposition of Vernon J. McKale in three volumes, taken by defendant.			(104)
May 10	Filed Response to Plaintiffs' Objections to Defendant's Requests for Admissions.			(105)
May 10	Filed Defendant's Objections to the Responsiveness of Plaintiffs' Answers to Interrogatories.			(106)
May 13	Filed Continued Oral Discovery Deposition of Vernon J. McKale by Defendant			(107)
May 13	Filed defendant's motion to strike interrogatories propounded by plaintiffs to union witnesses.			(108)
"	Filed defendant's notice ofhearing motion to strike, etc. on May 15, 1968 2 pm.			(109)
May 14	Lodged Plaintiff's Correction to Pre-Trial Order.			
~~May 14~~	~~Filed Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss.~~ (See #51393)			~~(110)~~
May 14	Filed Memorandum in Opposition to Defendant's Motion to Strike Plaintiff's Cross Interrogatories to Union Witnesses.			(110)
May 14	Filed Defendant's Motion to strike certain contentions of disputed facts.			(111)
May 15	Filed Deposition of James Q. Ronald on behalf of deft.			(112)
May 15	Filed Deposition of James Q. Ronald on behalf of deft.			(113)
"	Filed Deposition of Clyde A. McKale on behalf of deft.			(114)
"	Filed Deposition of Robert W. Graham on behalf of deft.			(115)
"	Filed Deposition of Richard S. Sprague on behalf of deft.			(116)
"	Filed Deposition of Miles W. Newby, Jr. on behalf of deft. (3 vols.)			(117)
"	Filed Defendant's Motion for Summary Judgment or Partial Summ. Jdgmt. with Memorandum attached.			(118)
"	Filed Defendant's Memorandum supporting Motion for Summary Judgment.			(119)
"	Filed Plaintiff's Deposition of John I. Mingay (3 volumes).			(120)

DATE 1968	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN ENCLOSURE RETURNS
5-15	Filed Plaintiff's Oral Examination of Anderson T. Leiper'			(121)
5-15	Filed Plaintiff's Oral Examination of James O. Sullivan.(2 vol.)			(122)
5-15	Filed Defendant's Objections to Plaintiff's Exhibits.			(123)
May 15	Case re-transferred to Judge Lindberg.			
May 15	Filed Objections to Defendant's Exhibits.			(124)
May 15	Filed Plaintiffs' Trial Brief.			125
May 15	Filed Reporter's Transcript of Proceedings of April 26.			(126)
May 15	Entered Record of pretrial hearing. Motion of defendant to strike interrogatories argued and taken under advisement. Motion for Summary Judgment set for May 20th at 3:00PM. Trial date set for May 22nd at 9:30AM. Plaintiffs' instructions and interrogatories to be filed May 20, 1968. Defendants' instructions and interrogatories to be filed May 22, 1968.			
May 15	Filed and entered Order making this a class action if New Rule 23, FRCP is applicable.			(127)
May 15	Filed Pretrial Order.			(128)
May 17	Filed Plaintiff's Answers to Defendant's Request for Admissions			(129)
May 17	Filed Defendant's Trial Brief.			(130)
May 20	Filed Plaintiff's Proposed Instructions.			(131)
"	Filed Defendant's Supplemental List of Exhibits for Pretrial Order.			(132)
"	Ent. order admitting William C. Wietzel specially on behalf of defendant.			
"	Ent. record of hearing on motion for summary judgment. Cont. to 10 a.m. May 21, 1968 for further hearing.			
May 21	Filed Affidavit of Amzy B. Steed re Production			(133)
"	Filed Memorandum by Defendant in opposition to Motion to Produce.			(134)
"	Filed Plaintiffs' Proposed voir dire questions to the Jury.			(135)
May 21	Ent. order after argument denying Defendant's motion for Summary Judgment.			
May 21	Filed Defendant's Proposed voir dire questions to Jury.			(136)
May 22	Filed Defendant's proposed General Verdict and Answer to Interrogatories.			(137)
"	Filed Defendant's Requested Jury Instructions.			(138)
May 22	RECORDED TRIAL BY JURY (1st day) exhibits.			
May 23	Filed Plaintiff's memorandum on objections to exhibits by defendant.			(139)
May 23	Ent. Record of Trial by Jury (2nd day), exhibits.			
May 24	Filed Plaintiff's memorandum on admissibility of documents.			(140)
May 27	Filed Deposition of Douglas Gregg (141); E. A. McFadden (142); C. E. Rathbone (143).			(Answers to written interrogatories by deft. Texaco).
"	Filed Defendant's Memorandum in Support of Contention that Certain Proposed Exhibits do not qualify as business records.			(141)

DATE 1968	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
May 27	Filed Defendant's Trial Brief on Admissibility of Testimony by a party as to transaction had by him with a person since deceased.			(142)
"	Filed Defendant's Memorandum Regarding Proposed Exhibits Which it Contends are Privileged.			(143)
"	Filed Defendant's Memorandum in Support of Contention that statements made by the late Mr. Cour are inadmissible.			(144)
May 27	ENTERED RECORD OF TRIAL BY JURY. (3rd day).			
May 28	Filed Deposition of John I. Mingay-behalf of plaintiffs.			(145)
"	ENT. RECORD OF TRIAL BY JURY. (4th day).			
May 29	ENTERED RECORD OF TRIAL BY JURY. (5th day).			
June 3	Filed Plaintiff's Memorandum re Defendant's Refusal to Produce.			(146)
June 3	Filed Memorandum of Law submitted by deft. respecting impropriety of imposition of any sanction or drawing of any inference because of failure to produce irrelevent and immaterial, by highly confidential corporate minutes.			(147)
June 3	ENTERED RECORD OF TRIAL BY JURY. (6th day)			
JUNE 4	ENTERED RECORD OF TRIAL BY JURY. (7th day).			
June 5	ENTERED RECORD OF TRIAL BY JURY. (8th day).			
June 6	ENTERED RECORD OF TRIAL BY JURY. (9th day).			
June 6	Entered order directing Texaco Company to furnish minutes to Referee-Special Master or the Court by Monday, June 10, 1968 at 3:00 P.M.			
June 10	ENTERED RECORD OF TRIAL BY JURY. (10th day).			
June 11	ENTERED RECORD OF TRIAL BY JURY. (11th day),			
June 12	Filed Defendant's Reply Memorandum Respecting Sanctions for Failure to Produce Irrelevant Corporate Minutes.			(148)
June 12	ENTERED RECORD OF TRIAL BY JURY. (12th day).			
Jun 13	ENTERED RECORD OF TRIAL BY JURY. (13th day).			
Jun 13	Entered record of hearing plaintiff's motion to produce minutes. The Court finds that there has been a violation of the Court's Order. The Court directs that a minute entry be made directing that the issue of Authority be deleted from this case.			
Jun 13	Filed Defendant's Motions at close of Plaintiffs' Case.			(149)
Jun 17	Filed Plaintiffs' Memorandum Re Court's Draft Instructions.			(150)
June 17	Entered RECORD OF TRIAL BY JURY (14th day).			
Jun 18	ENTERED RECORD OF TRIAL BY JURY (15th day).			
Jun 19	ENTERED RECORD OF TRIAL BY JURY. (16th day).			
Jun 20	ENTERED RECORD OF TRIAL BY JURY. (17th day).			
Jun 21	Filed Plaintiffs' Comments on Second Draft of Instructions.			(151)
Jun 21	ENTERED RECORD OF TRIAL BY JURY. (18thday).			
Jun 24	ENTERED RECORD OF TRIAL BY JURY. (19th day).			
Jun 25	ENTERED RECORD OF TRIAL BY JURY. (20th day).			
Jun 25	Filed Memorandum in Support of Plaintiffs' Requested Instructions #63.			(1
Jun 25	Filed Plaintiffs' Requested Instructions Nos. 41 thru 54.			(153)
Jun 26	Filed Plaintiff's Exceptions to Court's Proposed Instructions.			(154)
Jun 26	Filed Memorandum of Texaco Co. Order upon Writted Interrogatories.			(154a)
Jun 26	ENTERED RECORD OF TRIAL BY JURY. (21st day).			
Jun 27	Filed Defendant's Additional and Substituted or Modified Instructions.			(155)
June 27	Filed Defendant's Motions to Strike. (Ruling reserved).			(156)
June 27	Filed Defendant's Motion for Mistrial. (Ruling reserved).			(157)
June 27	Filed Defendant's Motion at Close of Evidence for Directed Verdict and Judgment.			(158)

D. C. 115A

DATE	PLEADINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
1968				
Jun 27	Filed Defendant's Memorandum Respecting Necessary Evidential Prerequisites to Recovery by Plaintiffs, Assuming, Arguendo, that a Valid Contract Existed and was Breached.			(159)
Jun 27	Filed Defendant's Memorandum on Statute of Frauds.			(160)
Jun 27	Filed Defendant's Exceptions to the Court's Instructions to the Jury.			(161)
Jun 27	Filed Defendant's Supplemental Exceptions to the Court's Instructions to the Jury.			(162)
Jun 27	Filed Defendant's Exceptions regarding the Court's Failure to Defendant's Requested Instructions and Charge the Jury in the Following Particulars and the Court's Failure to Pose Interrogatories to the Jury.			(163)
Jun 27	ENTERED RECORD OF TRIAL BY JURY. (22nd day).			
Jun 28	ENTERED RECORD OF TRIAL BY JURY. (23rd day).			
Jun 28	Entered order denying all of the defendant's motions.			
June 29	ENT. RECORD OF TRIAL BY JURY. (24th day). (Further deliberation)			
"	Filed Verdict for plaintiff in the sum of $62,559.00.			(164)
"	Filed Jurys' Answers to Special Interrogatories.			(165)
"	Ent. plaintiffs' motion to increase amount of verdict to cover evidence.			
"	Ent. order granting defendant's motion for an extra 10 days to move against verdict. (if in accordance with the law).			
July 2	Ent. Verdict in civil docket under Rule 58, FRCP.			
July 5	Filed Plaintiffs' Memorandum of Costs and Disbursements.			(166)
July 5	Filed Memorandum of Authorities in Support of Plaintiffs' Cost Bill.			(167)
July 5	Filed Plaintiffs' Notice of Hearing on Taxation of Costs, July 10, 1968.			(168)
July 10	Filed Defendant's objections to cost bill.			(169)
"	Entered costs taxed against defendant in amount of $1,930.70.			
Jul 12	Filed Defendant's Motion for New Trial.			(170)
Jul 12	Filed Defendant's Motion for Judgment Notwithstanding the Verdict or in the alternative to alter the judgment.			(171)
Jul 12	Filed Plaintiffs' Motion to Alter and Amend the Judgment to Increase the Amount of Damages or in the alternative for anew trial limited to the issues of damages.			(172)
Jul 12	Filed Plaintiff's Notice of Hearing above Motion on 8-2-68 at 11:00 A.M.			(173)
Jul 12	Filed Order extending time to July 26, 1968 to file all pleadings in support of post trial motions which were filed on or before July 12, 1968. Hearing on above motions set August 2, 1968 at 11:00 A.M.			(174)
July 17	Filed plaintiffs' motion for review of disallowance of costs.			(175)
"	Filed plaintiffs' notice of hearing motion for review of disallowance of costs on July 26, 1968 9:30 a.m.			(176)
Jul 25	Filed Defendant's Notice of Withdrawal of Motion for New Trial.			(177)
Jul 26	Filed Defendant's Memorandum of Law in Support of Defendant's Motions for Judgment Notwithstanding the Verdict or in the alternative to reduce the Judgment.			(178)

DATE 1968	PROCEEDINGS	CLERK'S FEE: PLAINTIFF	CLERK'S FEE: DEFENDANT	AMOUNT REPORTED EACH JUROR RETURNED
Jul 26	Ent. order setting 8-2-68 at 9:30 A.M. for Decision on Disallowance of Costs.			
Jul 29	Filed Memorandum in Support of Plaintiffs' Post Trial Motion. (179)			